Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(L)-(72–74)–03 OF 2019(W)

RICHARD MALANJUM CHIEF JUSTICE, ZAHARAH IBRAHIM CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), RAMLY ALI, ROHANA YUSUF, ZAWAWI SALLEH AND TENGKU MAIMUN FCJJ

10 APRIL 2019

Criminal Procedure — Trial — Stay of proceedings — Principles courts should follow when considering applications for stay of proceedings in a criminal trial — Court of Appeal ('COA') dismissed accused's appeals in respect of three criminal applications and then granted his oral application for stay of proceedings pending his appeal to Federal Court — Whether COA had no jurisdiction to grant stay — Whether when stay order granted no proceedings 'pending' before either the COA or the Federal Court as required, respectively, by ss 44(1) and 80(1) of the Courts of Judicature Act 1964 ('the CJA') — Whether stay order a nullity and had to be set aside — Whether accused not shown any exceptional or unusual circumstances to warrant grant of stay order — Whether even real possibility that Federal Court might rule that criminal proceedings against accused were a nullity did not amount to a 'special circumstance' warranting a stay of proceedings

The instant appeal was against the decision of the Court of Appeal ('COA') to grant a stay of the respondent's criminal trial for seven offences in the High Court pending the disposal of his appeal to the Federal Court against the COA's decision on three pre-trial criminal applications he had made. The COA had affirmed the trial court's dismissal of the three said applications. The appellant argued that the COA should not have granted the stay since it was not empowered by statute to do so; that even a stay granted in exercise of the court's inherent jurisdiction should only be made in exceptional circumstances. The appellant submitted that the circumstances in the instant case militated against the grant of a stay of proceedings because: (a) the respondent, a former prime minister of Malaysia, was charged with serious offences and the cases against him had generated much national and international attention; (b) the trial dates were fixed eight months ago; in this regard, s 172B(4) of the Criminal Procedure Code required that trials should commence no later than three months after an accused was charged; and (c) a speedier trial would give the respondent an earlier opportunity to vindicate himself. In reply, the respondent argued that in the instant case the COA was empowered under ss 44, 79 and 80 of the Courts of Judicature Act 1964 ('the CJA') to grant the stay. He also said that if the Federal Court agreed with his submissions on the appeals, there was a real possibility that the charges and proceedings against

him might be held to be nullities and that such an event would amount to special circumstances warranting a stay of proceedings. In granting the stay application, the COA opined that the respondent's appeals concerned novel issues of law and did not appear to be filed for the sake of delaying his trial. The COA also held that special circumstances would determine whether a stay should be granted whether the proceedings were civil or criminal.

Held, allowing the appeal, setting aside the COA's stay order, dismissing the respondent's oral application for a stay of proceedings and remitting the case back to the High Court for trial:

(1) Sections 44(1) and 80(1) of the CJA both spoke of 'pending proceedings' as a pre-requisite before an interim order could be made by the relevant court. When the stay application was made by the respondent, the COA had already dismissed his three appeals. As such, there was no longer any 'pending' proceeding before the COA that enabled it to exercise its jurisdiction to grant a stay of proceedings under s 44(1). Similarly, no proceeding was 'pending' before the Federal Court under s 80(1) of the CJA when the respondent's appeals were dismissed by the COA. There was only an undertaking by the respondent that he would be filing an appeal. In the face of the above, s 79 was irrelevant. Given the factual matrix of the present appeals, the respondent's reliance on ss 44(1), 80(1) and 79 of the CJA failed. The stay granted by the COA was made without jurisdiction and was a nullity. It was incumbent upon the Federal Court, pursuant to s 86 read with s 87 of the CJA, to exercise its revisionary power to rectify the grave error committed by the COA (see paras 16–17).

(2) The respondent was a public figure who stood charged with offences which could not by any means be described as trivial, allegedly committed when he was holding office as Prime Minister. Public interest, and indeed his personal interest, dictated that the trials against him should commence expeditiously without any unreasonable delay as it was at the denouement of the trial that the court was best-equipped to determine his guilt or otherwise based on factual evidence instead of speculative arguments. Furthermore, the respondent had not established to this Court's satisfaction that his application was so unusual or exceptional that it fell within that class of cases which justified the grant of a stay (see para 33).

(3) A stay of criminal proceedings would only be granted in the rarest of cases and the fact that the proceedings might be rendered a nullity was not a special circumstance. In the context of an application for a stay of proceedings, it was immaterial that the accused was put to the expense of a trial even if he was subsequently vindicated on appeal (see para 33).

(4) The respondent's assertion that the appellant's appeal was incompetent because there was no appeal record and no petition filed as required by the CJA was a non-issue because for criminal proceedings, the record of appeal including the grounds of judgment of the lower court was prepared by the court below (see r 91 of the Rules of the Federal Court 1995). And without the grounds of judgment, the appellant could not proceed to file the petition of appeal (see r 95 of the Rules of the Federal Court 1995). Accordingly, the appellant was not at fault and, in any case, the incomplete appeal papers were no impediment to this court hearing the appeal proper as the court was exercising its revisionary powers. At any rate, the stay order granted by the COA could not be sustained in the face of the correct test to be applied for a stay of criminal proceedings. The respondent's oral application for a stay of proceedings before this court was similarly dismissed in the absence of any 'exceptional or unusual circumstances' (see paras 34–35).

(5) In considering an application for stay of criminal proceedings when commencement of the trial was imminent or continuing in the court of first instance, the determinative principles were as follows: (a) there was strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences were tried; (b) it was undesirable that the criminal process should be interrupted or fragmented by interlocutory proceedings. The considerations of public interest were of great weight, leaning in favour of expeditious resolution of accusations of crime; (c) the undesirability of fragmenting the criminal process was not confined to any particular part of the criminal process but rather to the process as a whole. Any interference with any part of the process was antithetical to the proper and just disposition of criminal cases. The caution about the undesirability of fragmentation of criminal process would be more pronounced where a hearing of proceedings had actually commenced; (d) a stay of proceedings application would require especially compelling justification in a case qualifying for urgent judicial decision. For instance, it was important that anyone charged with serious criminal offences should be tried expeditiously. Public interest would not be served by allowing the defence to request for a delay. A person accused of serious criminal offences should have the opportunity of clearing his name without excessive delay; (e) a stay of proceedings would not normally be granted pending an interlocutory appeal in a criminal trial. Only in very exceptional or unusual circumstances would a stay order be granted. This was so even if the issuing of the interlocutory appeal was not opposed by the prosecution or, in fact, was supported by both the prosecution and the defence; (f) the accused's rights over preliminary or interlocutory rulings made by the trial judge were best vindicated by appeal after conviction, if any. It was generally more desirable to consider preliminary or interlocutory rulings made by the trial judge in appeal

after conviction upon full trial with the benefit of a concrete factual setting than considering them in the abstract during interlocutory appeal; (g) the fact that an accused would be put to the expenses of a trial was irrelevant and would not qualify as 'exceptional circumstances' to justify a stay of a criminal trial pending resolution of an appeal; and (h) courts should exercise great caution in allowing other forms of collateral challenge in parallel proceedings, such as an application for a declaration or other form of judicial review with similar relief in the nature of certiorari, be it commenced in the same court or another civil or criminal court, which had the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial (see para 32).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan Mahkamah Rayuan ('MR') untuk memberikan penggantungan untuk perbicaraan jenayah responden untuk tujuh kesalahan di Mahkamah Tinggi sementara menunggu selesai rayuannya kepada Mahkamah Persekutuan terhadap keputusan MR berhubung tiga permohonan jenayah pra-perbicaraan yang telah dibuatnya. MR telah mengesahkan penolakan mahkamah perbicaraan untuk tidak permohonan tersebut. Perayu berhujah bahawa MR tidak patut meberikan penggantungan oleh kerana ia tidak diberi kuasa oleh statut untuk berbuat sedemikian, bahawa meskipun penggantungan diberikan untuk melaksanakan bidang kuasa sedia ada mahkamah hanya patut dibuat dalam keadaan luar biasa. Perayu berhujah bahawa keadaan dalam kes ini membantah terhadap penggantungan prosiding kerana: (a) responden, mantan perdana menteri Malaysia, telah dituduh dengan kesalahan-kesalahan serius dan kes-kes terhadapnya menarik perhatian nasional dan antarabangsa; (b) tarikh-tarikh perbicaraan ditetapkan lapan bulan sebelumnya; dalam hal ini, s 172B(4) Kanun Tatacara Jenayah menghendaki bahawa perbicaraan patut dimulakan tidak lewat daripada tiga bulan selepas tertuduh didakwa; dan (c) perbicaraan yang lebih cepat akan memberikan responden peluang lebih awal untuk membebaskan dirinya. Sebagai jawapan, responden berhujah bahawa dalam kes ini MR diberi kuasa di bawah ss 44, 79 dan 80 Akta Mahkamah Kehakiman 1964 ('AMK') untuk memberikan penggantungan. Dia juga mengatakan bahawa jika Mahkamah Persekutuan bersetuju dengan hujah-hujahnya berhubung rayuan-rayuan tersebut, terdapat kemungkinan sebenar bahawa pertuduhan-pertuduhan dan prosiding-prosiding terhadapnya boleh dianggap mungkin dianggap sebagai terbatal dan bahawa kejadian sedemikian merupakan keadaan khusus yang mewajarkan penangguhan prosiding. Dalam memberikan penggantungan permohonan, MR berpendapat bahawa rayuan responden adalah berkenaan isu-isu baru undang-undang dan tidak difailkan untuk melengahkan perbicaraannya. MR juga berpendapat bahawa keadaan khusus akan menentukan sama ada penggantungan perlu diberikan sama ada prosiding adalah sivil atau jenayah.

Diputuskan, membenarkan rayuan, mengetepikan perintah penggantungan MR, menolak permohonan lisan responden untuk penggantungan prosiding dan meremitkan kes itu kepada Mahkamah Tinggi untuk perbicaraan:

(1) Seksyen 44(1) dan 80(1) AMK kedua-duanya menyebut tentang 'pending proceedings' sebagai prasyarat sebelum perintah interim boleh dibuat oleh mahkamah yang relevan. Apabila permohonan penggantungan dibuat oleh responden MR telahpun menolak ketiga-tiga rayuannya. Oleh itu, tiada lagi apa-apa prosiding yang 'pending' di hadapan MR yang membolehkannya untuk melaksanakan bidang kuasanya untuk memberi penggantungan prosiding di bawah s 44(1). Begitu juga, tiada prosiding adalah 'pending' di hadapan Mahkamah Persekutuan di bawah s 80(1) AMK sapabila rayuan-rayuan responden ditolak oleh MR. Hanya terdapat akujanji oleh responden bahawa dia akan memfailkan rayuan. Berikutan di atas, s 79 adalah tidak relevan. Berdasarkan matriks faktual rayuan-rayuan ini, kebergantungan responden pada ss 44(1), 80(1) dan 79 AMK gagal. Penggantungan diberikan oleh MR telah dibuat tanpa bidang kuasa dan adalah terbatal. Ia adalah penting untuk Mahkamah Persekutuan, menurut s 86 dibaca bersama s 87 AMK, untuk melaksanakan kuasa semakannya bagi memperbetulkan kesilapan yang telah dilakukan oleh MR (lihat perenggan 16–17).

(2) Responden adalah tokoh masyarakat yang dituduh kerana kesalahan-kesalahan yang tidak boleh dalam apa cara digambarkan sebagai remeh, yang dikatakan telah dilakukan semasa beliau memegang jawatan Perdana Menteri. Kepentingan awam, dan sememangnya kepentingan peribadinya, menentukan bahawa perbicaraan-perbicaraan terhadapnya hendaklah dilaksanakan dengan segera tanpa kelewatan yang tidak munasabah kerana ia adalah penyelesaian perbicaraan itu yang mahkamah dilengkapi dengan baik untuk menentukan kebersalahannya atau sebaliknya berdasarkan bukti fakta dan bukan hujah spekulatif. Selain itu, responden tidak membuktikan dengan meyakinkan kepada mahkamah ini bahawa permohonannya sangat luar biasa atau luar biasa bahawa ia terjatuh dalam kelas kes-kes yang mewajarkan pemberian penggantungan (lihat perenggan 33).

(3) Penggantungan prosiding jenayah hanya diberikan dalam kes-kes yang paling jarang berlaku dan fakta bahawa prosiding itu mungkin menyebabkan terbatal bukan keadaan yang istimewa. Dalam konteks suatu permohonan untuk penggantungan prosiding, ia tidak penting bahawa tertuduh telah dibebankan perbicaraan walaupun dia kemudiannya dibuktikan tidak bersalah semasa rayuan (lihat perenggan 33).

(4) Dakwaan responden bahawa rayuan perayu adalah tidak kompeten kerana tiada rekod rayuan dan tiada petisyen yang difailkan seperti yang

dikehendaki oleh AMK adalah suatu yang bukan merupakan isu kerana untuk prosiding jenayah, rekod rayuan termasuk alasan penghakiman mahkamah bawahan disediakan oleh mahkamah bawahan (lihat k 91 Kaedah-Kaedah Mahkamah Persekutuan 1995). Dan tanpa alasan penghakiman, perayu tidak dapat meneruskan dengan pemfailan petisyen rayuan (lihat k 95 Kaedah-Kaedah Mahkamah Persekutuan 1995). Oleh itu, perayu tidak bersalah dan, dalam apa jua keadaan, kertas rayuan yang tidak lengkap tidak menghalang mahkamah ini untuk mendengar rayuan yang sepatutnya kerana mahkamah telah menjalankan kuasa semakannya. Walau apapun, perintah penggantungan yang diberikan oleh AMK tidak dapat dikekalkan berdasarkan ujian yang wajar terpakai untuk penggantungan prosiding jenayah. Permohonan lisan responden untuk penggantungan prosiding di hadapan mahkamah ini juga ditolak kerana tiada apa-apa 'exceptional or unusual circumstances' (lihat perenggan 34–35).

(5) Dalam menimbangkan permohonan untuk menangguhkan prosiding jenayah apabila permulaan perbicaraan itu akan berlaku atau berterusan di mahkamah yang pertama, prinsip-prinsip penentu adalah seperti berikut: (a) terdapat kepentingan awam dalam pendakwaan jenayah dan dalam memastikan bahawa mereka yang dituduh dengan kesalahan jenayah yang serius dibicarakan; (b) adalah tidak diingini jika proses jenayah diganggu atau dipecahkan oleh prosiding interlokutori. Pertimbangan untuk kepentingan awam adalah penting, yang berlandaskan tuk menyokong penyelesaian segera suatu pertuduhan jenayah; (c) pecahan proses jenayah yang tidak diingini ini tidak terhad kepada mana-mana bahagian proses jenayah, melainkan proses keseluruhannya. Mana-mana campur tangan dengan mana-mana bahagian proses itu adalah bersifat *antithetical* keputusan wajar dan adil untuk kes-kes jenayah. Perhatian tentang pemecahan proses jenayah yang tidak diingini ini akan lebih ketara jika perbicaraan prosiding telah dimulakan; (d) suatu permohonan penggantungan prosiding memerlukan justifikasi yang mendesak dalam suatu kes yang layak untuk keputusan kehakiman segera. Sebagai contoh, adalah penting bahawa sesiapa yang dituduh dengan kesalahan jenayah yang serius hendaklah dibicarakan dengan cepat. Kepentingan awam tidak dapat dilaksanakan jika membenarkan pembelaan meminta ia dilewatkan. Seseorang yang dituduh melakukan kesalahan jenayah yang serius hendaklah mempunyai peluang untuk membersihkan namanya tanpa kelewatan yang melampau; (e) penggantungan prosiding biasanya tidak diberikan sementara menunggu rayuan interlokutori dalam perbicaraan jenayah. Hanya dalam keadaan sangat luar biasa atau luar biasa, perintah penggantungan akan diberikan. Begitu juga sekiranya dengan memulakan rayuan interlokutori itu tidak ditentang oleh pendakwaan atau, sebenarnya, disokong oleh kedua-dua pendakwaan dan pembelaan;

(f) hak tertuduh terhadap keputusan awal atau interlokutori yang dibuat oleh hakim perbicaraan dibuktikan melalui rayuan selepas disabitkan, jika ada. Secara umumnya ia lebih baik untuk mempertimbangkan keputusan awal atau interlokutori yang dibuat oleh hakim perbicaraan dalam rayuan setelah sabitan berdasarkan perbicaraan penuh dengan kelebihan penetapan faktual yang konkrit daripada membuat pertimbangan secara abstrak semasa rayuan interlocutori; (g) hakikat bahawa tertuduh akan dibicarakan adalah tidak relevan dan tidak layak 'exceptional circumstances' untuk mewajarkan penggantungan perbicaraan jenayah yang sedang menunggu keputusan rayuan; dan (h) mahkamah hendaklah berhati-hati dalam membenarkan apa-apa bentuk cabaran kolatera lain dalam prosiding yang selari, seperti permohonan untuk deklarasi atau apa-apa bentuk semakan kehakiman lain dengan relif sama yang bersifat certiorari, sama ada dimulakan di mahkamah yang sama atau mahkamah sivil atau jenayah yang lain, yang mempunyai kesan penggantungan terhadap prosiding jenayah atau akan mengganggu atau menyekat secara langsung pelaksanaan biasa prosiding dalam perbicaraan jenayah. (lihat peranggan 32).]

Notes

For cases on stay of proceedings, see 5(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6204–6208.

Cases referred to

AB (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 921, CA (folld)

Anderson And Others v Attorney-General for New South Wales And Others (1987) 10 NSWLR 198, CA (refd)

Atlas v Director of Public Prosecutions And Others [2001] VSC 209, SC (refd)

Attorney General's Reference (No 2 of 2001) [2003] UKHL 68, HL (refd)

Beljajev v Director of Public Prosecutions And Another (1991) 173 CLR 28, HC (refd)

Beljajev v Director of Public Prosecutions (1991) 65 ALJR 400 (refd)

Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2) [1998] 2 MLJ 661, CA (refd)

Christian and others v The Queen [2007] 2 AC 400, PC (distd)

Dato' Seri Anwar bin Ibrahim v PP [2011] 5 MLJ 535, CA (refd)

De Simone v The Queen [2012] HCATrans 86, HC (refd)

Edelsten v Ward (No 2) (1988) 63 ALJR 346, HC (refd)

Fuller & Cummings v Director of Public Prosecutions (Cth) (1994) 68 ALJR 611, HC (refd)

Gedeon v Commissioner of the New South Wales Crime Commission (2008) 236 CLR 120, HC (refd)

Hinch v County Court of Victoria [2009] VSC 548, SC (refd)

Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of

Trade Marks, intervener) [2015] 4 MLJ 166, FC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Jarrett v Seymour (1993) 119 ALR 46, FC (refd)
Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd (No 1) (1986) 161 CLR 68, HC (refd)
Joosse v Australian Securities and Investment Commission (1998) 73 ALJR 232, HC (refd)
Khalil v His Honour, Magistrate Johnson & Anor [2008] NSWSC 1092, SC (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)
McNamara v The Queen (1978) 20 ALR 98 (refd)
Michael Rozenes, Director of Public Prosecutions, And Anor, Re (1994) 120 ALR 193, HC (refd)
Peter Clyne v The Director of Public Prosecutions for The Commonwealth of Australia and The Attorney-General for The Commonwealth of Australia (1984) 154 CLR 640, HC (refd)
PP v Dato' Seri Anwar bin Ibrahim [2010] 2 MLJ 353; [2010] 4 CLJ 331, CA (refd)
PP v Dato' Seri Anwar bin Ibrahim [2014] 4 MLJ 495; [2014] 5 CLJ 805, FC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Ishak bin Hj Shaari & Other Appeals [2003] 4 MLJ 585; [2003] 3 CLJ 843, CA (refd)
R (on the application of AO & AM) v Secretary of State for the Home Department (stay of proceedings – principles) [2017] UKUT 168 (IAC) (refd)
R v Chardon [2016] QCA 50, SC (refd)
R v Crawley and others [2014] EWCA Crim 1028, CA (refd)
R v Garrett (1988) 49 SASR 435 (refd)
R v WR [2009] ACTSC 93 (refd)
Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd [2005] 3 MLJ 132, CA (refd)
Sankey v Whitlam (1978) 142 CLR 1, HC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Seymour v Attorney-General (Cth) (1984) 4 FCR 498 (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd) [2002] 4 MLJ 113, CA (refd)
Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals [2008] 2 MLJ 147, FC (refd)
Suruhanjaya Sekuriti v Datuk Ishak bin Ismail [2016] 1 MLJ 733, FC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor [2012] 7 MLJ 657, HC (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3) [2010] 2 MLJ 141, FC (refd)

The Attorney-General v Smith (1985) 39 SASR 311 (refd)
The Queen v AI, AD and JR [2013] ACTCA 16 (refd)
The Queen v Iorlano (1983) 151 CLR 678, HC (refd)
Wickham Marony v Taylor, In re (1887) 35 Ch D 272, Ch D (refd)
Yates v Wilson (1989) 18 CLR 338, HC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 4, 32(a), (b), (c), 40
Courts of Judicature Act 1964 ss 20, 44, 44(1), 79, 80, 80(1), 86, 87
Criminal Procedure Code ss 51A, 172B(4), 311, 417(1)(cc), (2), 417, 417(1)(cc), (2), 418A
Evidence Act 1950
Federal Constitution arts 10, 126
Malaysian Anti-Corruption Commission Act 2009 ss 23, 30(1)(a), (1)(b), (1)(c), (8), (9), 60, 62
Penal Code s 409
Rules of the Federal Court 1995 rr 91, 95

Appeal from: Criminal Appeal Nos W-05–415–08 of 2018, W-05–1–01 of 2019 and W-05–72–02 of 2019 (Court of Appeal, Putrajaya)

Tommy Thomas (Sithambaram s/o Vairavan, Manoj Kurup, Donald Joseph Franklin and Izzat Fauzan with him) (Attorney General's Chambers) for the appellant.
Harvinderjit Singh (Farhan Read, Wan Aizuddin Wan Mohamed, Rahmat Hazlan, Farhan Shafee and Shahirah Hanapiah with him) (Shafee & Co) for the respondent.

Richard Malanjum Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] The respondent is the immediate former Prime Minister of Malaysia who is currently facing seven charges before the High Court, ie: (i) one charge under s 23 of the Malaysian Anti-Corruption Commission Act 2009; (ii) three charges under s 409 of the Penal Code; and (iii) three charges for offences under s 4 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA proceedings').

[2] The present appeals emanate from the decision of the Court of Appeal granting an order of stay of proceedings and consequently stopping the commencement of a trial against the respondent at the High Court pending the disposal of his appeals to this court. Dissatisfied with the decision of the Court of Appeal granting stay, the appellant filed the present appeals.

[3] The three appeals pending before this court filed by the respondent relate to: A

(a) his failure to secure a 'gag order' restraining publication by members of the public on matters pertaining to his prosecution and trial;

(b) his failure to secure documents other than those provided under s 51A of the Criminal Procedure Code ('the CPC') prior to the commencement of trial although 32 bundles (7,000 pages) of documents had already been served to him by the prosecution in compliance with its statutory duty under s 51A of the CPC; and B

(c) his failure to challenge the withdrawal by the public prosecutor of a transfer certificate to transfer the case against the respondent to the High Court, which is the agreed forum of both parties for this trial. C

[4] In essence, the appellant relies on the following grounds of appeal: D

(a) the test for granting a stay should be different for civil and criminal trials. Staying a criminal trial should in law be differently treated from staying a civil trial. The omission of power of the appellate courts in their criminal jurisdiction to grant stay of proceedings was deliberate and the parliamentary draftsperson had good reason to treat the power in civil and criminal stays separately and distinctly; E

(b) precedents in civil cases relied by the respondent before the Court of Appeal like *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 and *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132 must be treated with caution in criminal proceedings; F

(c) with the coming into force of s 172B(4) of the CPC in 2012, the previous practice of delaying criminal trials for many years is a thing of the past. If trials are statutorily required to commence within three months, granting a stay will defeat this objective. Stay of a criminal trial should only be granted on exceptional grounds: that is sparingly so as not to defeat the purposive object of s 172B(4) of the CPC for trials to start in three months; and G

(d) if this court is of the view that special circumstances are the principal consideration in determining an application for stay of proceedings for criminal trials, the facts in this case militates against the granting of a stay because no special circumstances favoring the respondent exist. On the contrary, these factors indicate that a stay should be refused: H

(i) the offences for which the respondent have been charged are serious in nature; I

(ii) this case is one of public and national importance; it has generated

much public interest locally as well as internationally;

(iii) trial dates were fixed eight months ago as opposed to the three months specified under s 172B(4); and

(iv) that no prejudice would be caused to the respondent because he will have an early opportunity to vindicate himself.

BEFORE THE HIGH COURT

[5] Three matters were brought before the High Court for determination.

Case No WA-44–115–07 of 2018:

(a) the respondent had filed a notice of motion to prevent the media and the public from discussing the merits of the criminal charges against the respondent until the conclusion of proceedings;

(b) an interim gag order had been put into effect at the conclusion of an oral application after the initial four charges were read on 4 July 2018. A subsequent formal application was filed and fixed for hearing on 19 April 2018;

(c) while the respondent had no issue with accurate reporting and articles that were fair, factually accurate, and published contemporaneously in good faith, the motion is for an order to prevent the publication of opinions on guilt or innocence and character of the respondent, as well as those of the witnesses, and to prevent discussion of the merits predicting or even influencing the outcome of the trial;

(d) the respondent sought the order to ensure that he would receive a fair trial, and the order would be proportionate and would not unfairly impinge upon the interest of free speech;

(e) the appellant took the position that the court did not have jurisdiction to grant such an order and that this was not a proper case for the court to invoke its inherent powers. There was no substantial risk of prejudice to the administration of justice, and that there were many remedies available to the respondent to protect his interests;

(f) the appellant contended that a gag order would infringe art 10 of the Federal Constitution, and that the order would be in vain as it would potentially not bind the international media. The appellant argued that sub judice would be inapplicable due to the absence of jury trials in this country;

(g) the learned trial judge found that the scope of the application was plainly wide, and the respondent's intention was to stop future discussion or publication that would prejudice his right to a fair trial, the ramifications of which would result in a contempt of court. The learned

trial judge found that according to art 126 of the Federal Constitution the courts did have the power to make orders in the nature of prior restraint against prejudicial discussions or publications affecting a fair trial. But the test to be applied before such orders are made is to consider whether the risk of prejudice to a fair trial is serious or real or substantial. The learned trial judge referred to *Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor* [2012] 7 MLJ 657;

(h) the learned trial judge found that the immediacy of the risk or threat of the prejudice is especially pertinent when one seeks a prohibition which involves a pre-emptive and prior restraint order, as those who are in breach would immediately be in contempt as opposed to situations where in the absence of a gag order an action for contempt is only taken after the actual commissions of the contemptuous act. There is a heavier burden of showing the immediacy of the threat. The gag order must be shown to be necessary to prevent an immediate threat of a real and substantial risk of serious prejudice to the administration of justice in the relevant proceedings, in the absence of alternative measures, and is proportionate in reference to the competing interests of free speech and risk of prejudice to a fair trial;

(i) the learned trial judge found that since there are no jury trials in Malaysia and that cases are tried before a single judge who is constitutionally duty-bound to consider only the evidence in court and disregard all extraneous matters, the possibility of prejudice from unwarranted publications is unmistakably remote. This is not to say judges are infallible, but it bears emphasis that judges in discharging their judicial responsibilities must only consider the facts and the law applicable to the particular case and cannot succumb to public opinion;

(j) the learned trial judge found that the absence of jury trials meant that the scope for the application of the sub judice rule is decidedly more circumscribed in the Malaysian justice system. As for the unwarranted publicity influencing witnesses, they would be subject to examination-in-chief, cross-examination, and re-examination to determine their reliability, credibility or lack thereof. The decisions of the judges would also be subject to appeals;

(k) some accusatory articles cited by the respondent had been in the public sphere since 2014, negating the element of immediacy. The respondent had also given interviews attempting to answer the allegations, and probably attracted far greater public and media interest than the less-than-current allegations that have surfaced for a number of years. This also suggests a balanced reporting of the rival views; and

(l) legal remedies are available to the respondent, making the gag order unnecessary as contempt laws and defamation laws can be resorted to.

A The gag order is also difficult to sustain as it is targeted to the world at large, and the application proposes a scope significantly wider that what has been affirmed in the accompanying affidavit in support.

Thus, the learned High Court judge dismissed the application.

B Case No WA-44–160–10 of 2018:

(a) the appellant filed a notice of motion for pre-trial production of statements and documents given by potential witnesses to the Malaysian Anti-Corruption Commission ('MACC') in the course of C investigations;

(b) the appellant had delivered all documents under s 51A of the CPC, mostly covering the documents sought by the respondent in this notice of motion, save for paras 1(g), (h), (i), (j), and 2(b)(i). These mainly pertain to names, statements, information and documents obtained D under s 30(1)(a), (b), (c) and 30(8) of the MACC Act and s 32(a), (b) and (c) of the AMLATFA. The respondent also sought for a list of witnesses the appellant intends to call and their proposed order;

(c) the thrust of the application is on the non-obstante clauses (latin: E notwithstanding) whereby, these statements, documents etc, such as those obtained under s 30(9) of the MACC Act and s 40 of the AMLATFA, are automatically admissible at the behest of either party. It is the respondent's contention that due to this very nature, they ought to be supplied to the respondent before commencement of trial, and that F this is also supported by s 62 of the MACC Act, as well as the role of the court;

(d) the appellant's position is that the application ought to be dismissed as the respondent has misconstrued s 30(9) of the MACC Act and s 40 of G the AMLATFA to exclude all other legislation/provisions, particularly the Evidence Act 1950. The non-obstante clauses must be read subject to the rules of privilege and prohibition on the grounds of public policy;

(e) the learned trial judge made reference to *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733 that held that where statements H taken in the course of investigations are to be automatically admissible, they must be subject to provisions of the Evidence Act, which were made to codify rules pertaining to law of privilege and public policy against disclosure of investigation statements. While the respondent argued that I the provisions of *Datuk Ishak*'s case did not involve a non-obstante clause, the learned trial judge further referred to *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166 and held that the respondent had not clearly made out a case as to the extent to which the Legislature had

intended to give the relevant non-obstante clauses overriding effect over all other rules and legal provisions;

(f) the learned trial judge held that the admissibility of these documents did not equate to the right to inspect. The respondent cited various authorities from Commonwealth jurisdictions, and even beyond, and propagated the equality of arms principle by claiming the respondent was being put at a disadvantage if not afforded the opportunity to view the documents etc. However, the learned trial judge was of the view that the respondent did not demonstrate how he was being discriminated against, as compared to the other persons who are similarly under investigation by the MACC. While other countries have had advancements in adhering to the equal arms principle, Malaysia too has seen fundamental progress with the introduction of s 51A of the CPC. Any further development must await legislative intervention, and cannot be achieved by mere and purported prismatic construction of constitutional prescriptions; and

(g) the learned trial judge found that other than s 51A of the CPC and s 62 of the MACC Act, no other law or clear legislative prescriptions exist demanding disclosure, and no automatic disclosure can be founded on non-obstante clauses. There has been no compelling legal analysis that could support the quantum leap from automatic admissibility to right to inspection. The learned trial judge made reference to *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [2010] 2 MLJ 353; [2010] 4 CLJ 331.

Hence the respondent's application was dismissed as he had failed to establish a case for delivery of the information and documents applied for.

Case No W-05–72–02 of 2019:

(a) the High Court had fixed the trial of the seven charges on 12 February 2019 and to continue on 29 March 2019;

(b) on both dates of 4 July 2018 and 8 August 2018, the charges were initially filed at the sessions court but they were immediately transferred on the same dates to High Court pursuant to the certificate issued by public prosecutor under s 418A of the CPC and s 60 of the MACC Act;

(c) on 28 January 2019 another three additional charges under the AMLATFA were read out to the accused. The prosecution asked for these three new charges to be jointly tried with existing seven charges. Counsel for the respondent asked the High Court to allow the defence a few days to consider. The court allowed the request and fixed hearing for submission of the parties on the proposed joint trial on 7 February 2019;

(d) on 7 July 2019, the appellant informed the court that a ruling on the issue of joinder would not be necessary as he was proposing not to

proceed on the three new charges and asked for the respondent be granted a DNAA (discharge not amounting to acquittal), since the prosecution would file these charges before the sessions court instead. The High Court then ordered the DNAA of the respondent on the three new charges;

(e) the appellant also wished to withdraw the transfer certificates that had been previously issued under s 418A of the CPC and s 60 of the MACC Act to transfer the seven charges to the High Court;

(f) the withdrawal was stated by the appellant to be done out of abundance of caution in order to avoid any possible constitutional argument that the transfer effected by the appellant under s 418A of the CPC and s 60 of the MACC was a nullity in view of the decisions of this court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545;

(g) the appellant informed the High Court that upon withdrawal, the cases on the seven charges would be reverted to the sessions court where they originated. The prosecution then immediately applied under s 417 to have the cases transferred back to the High Court;

(h) alternatively, the appellant suggested the High Court to act *suo moto* (on its own motion) under s 417(2) of the CPC to order the transfer of the cases from the sessions court back to High Court. The appellant highlighted that these procedural steps would be necessary to prevent any unwarranted postponement of the trial; and

(i) the learned trial judge then ordered the transfer of the seven charges from the sessions court back to the High Court in accordance with s 417(1)(cc) of the CPC.

[6] It is to be noted that following the dismissal of these three criminal applications the respondent made an oral application for a stay of proceedings that were to commence on 12 February–29 March 2019, pending the appeals against the dismissal of the same. The learned High Court judge dismissed the application for a stay of proceedings on the ground that the mere prospect of the trial being a nullity could not be construed as special circumstances to warrant a stay of proceedings.

BEFORE THE COURT OF APPEAL

[7] Aggrieved by the decision of the High Court, the respondent appealed to the Court of Appeal where all the appeals were heard together. Prior to the hearing to the appeals the respondent applied for a stay of proceedings under s 44 of the Courts of Judicature Act 1964 ('the CJA'). A stay of proceedings was

duly allowed by the Court of Appeal pending the disposal of the appeals proper. On 21 March 2019 the Court of Appeal dismissed the respondent's appeals and on oral application by the respondent granted an order to stay the proceedings pending the disposal of the respondent's appeals to this court.

[8] The Court of Appeal opined that there is no distinction between civil and criminal proceedings and that what is relevant is whether there are special circumstances. From the facts, the Court of Appeal held that the prospect of the charges being declared a nullity was there. Moreover the present appeals involved novel issues namely the withdrawal of the s 418A certificate, the pre-emptive gag order and discovery of documents based on non-obstante clauses. The Court of Appeal also found that there were no delaying tactics by the respondent.

ISSUES BEFORE THIS COURT

[9] The question before us is whether the Court of Appeal was correct in allowing the respondent's application for a stay of the criminal proceedings.

THE APPELLANT'S SUBMISSION

[10] It is the appellant's position that in respect of the present appeals, which are all of an interlocutory nature:

(a) concurrent findings by both the courts below have been made against the accused and that the appeals are frivolous and doomed to fail;

(b) a distinction should be made between a stay of execution that is governed by s 311 of the CPC and a stay of proceedings, on which the CPC is silent. This difference must be taken to have been a deliberate act by the parliamentary draftsperson to highlight the distinction between the both particularly when read together with s 172B(4) of the CPC which provides that criminal trials should start no later than three months after an accused has been charged. If trials are statutorily required to commence within three months after an accused has been charged, then granting a stay would defeat this objective;

(c) furthermore, under the Courts of Judicature Act 1964 (Act 91), both appellate courts have jurisdiction to grant stay of proceedings and stay of execution in civil matters but in criminal matters the appellate courts only have power to grant a stay post-conviction, that is, at the conclusion of trial. Again this omission by the parliamentary draftsperson must been taken to have been intentional;

(d) notwithstanding an absence of statutory power to order the stay of a criminal trial, the court may still exercise power to order a stay of

criminal proceedings by way of its inherent jurisdiction. However, this absence of statutory power to stay criminal trials must mean that:

(i) the test for granting a stay should be different for civil and criminal trials;

(ii) precedents laid down in civil cases must be treated with caution in criminal matters; and

(iii) a stay of a criminal trial should only be granted in exceptional circumstances (as per the Court of Appeal decision in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 5 MLJ 535);

(e) if the civil law test of 'special circumstances' is applicable in a criminal law context, it is the possibility of the *appeal* being rendered nugatory that needs protection, and not the proceedings in the court below. On the facts, the appeals would not be rendered nugatory if a stay of the trial is refused because the accused would still be able to proceed with the hearing of the appeals currently pending before this court; and

(f) in *Dato' Seri Anwar bin Ibrahim* a stay was refused for a charge of sodomy. For the present appeals, no 'special circumstances' favouring the accused exist as:

(i) the offences are serious in nature;

(ii) the case is one of public and national importance;

(iii) it has generated much public interest locally as well as internationally;

(iv) trial dates were fixed eight months ago (as opposed to the three months specified under s 172B(4); and

(v) no prejudice will be caused to the accused because he will have an early opportunity to vindicate himself.

THE RESPONDENT'S SUBMISSIONS

[11] The respondent on the other hand contends that:

(a) the Court of Appeal in issuing the 'interim order' was fully empowered under ss 44, 79 and 80 of the CJA to stay of proceedings;

(b) ss 44 and 80 of the CJA fall within the 'general' provisions applicable to both the civil and criminal jurisdiction of the Court of Appeal and Federal Court;

(c) cases such as *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)* [2002] 4 MLJ 113, *Chong Wooi Leong & Ors v Lebbey Sdn Bhd (No 2)* [1998] 2 MLJ 661,

Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3) [2010] 2 MLJ 141, and *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132 affirm the jurisdiction of the Court of Appeal to make interim orders under s 44 or s 80 of the CJA in the nature of stay of proceedings in order to 'prevent prejudice to the claims of parties' pending the hearing of an appeal and to 'preserve the integrity of pending appeals';

(d) the court retains inherent jurisdiction to make any orders to prevent prejudice to an accused person. The CPC is limited to the procedure to try offences and is not an exhaustive directory of the court's powers. As part of the inherent powers of the court it may do all things reasonably necessary to ensure fair administration of justice and to safeguard an accused person from oppression or prejudice;

(e) the case of *Dato' Seri Anwar bin Ibrahim* adopted the special circumstances approach and the nugatory approach;

(f) the court should not consider the merits of the case in an application for stay; and

(g) the prospect that the trial is rendered a nullity amounts to special circumstances. For the present appeals, the potential nullity of proceedings arises from the following:

(i) if the Federal Court agrees with the respondent on the issue of natural justice, the entire proceedings would be nullified (see: *Public Prosecutor v Ishak bin Hj Shaari & Other Appeals* [2003] 4 MLJ 585; [2003] 3 CLJ 843). If the proceedings are subsequently nullified, it would waste the time and effort of all persons involved. Besides, a retrial in the event of nullity would be prejudicial to the respondent as the witnesses who are re-examined may change their evidence and the prosecution may get a second bite of the cherry in the conduct of the trial;

(ii) if the public prosecutor has no power to withdraw the s 418A certificate and had acted unconstitutionally when he did so, the proceedings would be vitiated;

(iii) if the matter was never 'pending' before the sessions court as no plea was taken therein, the High Court could not have exercised the powers under s 417(2) of the CPC (see: *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 (SC) and s 417(2) of the CPC);

(iv) the High Court judge had allegedly exercised his powers *suo muto* to transfer the matter back to himself, thereby bypassing the registry and the powers of the Chief Judge of Malaya under s 20 of the CJA to distribute business;

(v) the appellant's reliance on *Christian and others v The Queen* [2007] 2 AC 400 (PC) is distinguishable in fact and law because in that case the application for a stay was a final remedy sought by the accused in the substantive appeal on the grounds of an alleged abuse of process while the present appeals are in respect of an interlocutory application for a stay of proceedings pending appeal;

(vi) the *Dato' Seri Anwar bin Ibrahim* case which held that 'delaying tactics engineered by the appellant should be a factor in refusing to grant the stay' is distinguishable in fact as the Court of Appeal had on two occasions held that there was no evidence of any delay tactics by the respondent; and

(vii) the Court of Appeal's ruling in granting stay of proceedings is consistent with the decision of this court in *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other appeals* [2008] 2 MLJ 147 as its purpose is to maintain the status quo of an earlier interim order pending an appeal on a matter that has been dismissed.

DECISION OF THIS COURT

[12] As alluded to above, the only issue in the present appeals is confined to the decision of the Court of Appeal granting an order to stay the commencement of a criminal trial pending disposal of three appeals brought by the defence to this court.

[13] During the course of oral submissions before us, the respondent confirmed that the Court of Appeal had allowed a stay of proceedings based on ss 44, 79 and 80 of the CJA alone.

Section 44(1) of the CJA reads:

> In any proceeding *pending before the Court of Appeal* any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal. (Emphasis added.)

[14] Next, s 79 of the CJA states that:

> Whenever *application* may be made either to the Court of Appeal or to the Federal Court, it shall be made in the first instance to the Court of Appeal. (Emphasis added.)

[15] While s 80(1) of the CJA provides that:

> In any proceeding *pending before the Federal Court* any direction incidental thereto not involving the decision of the proceeding, *any interim order to prevent prejudice to the claims of parties* pending the hearing of the proceeding, any order for *security for costs*, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time *be made by a Judge of the Federal Court*. (Emphasis added.)

[16] We have scrutinised ss 44(1) and 80(1) of the CJA. It is noteworthy that both speak of 'pending proceedings' as a pre-requisite before an interim order can be made by the relevant court. It is to be noted that when the stay application was made by the respondent, the Court of Appeal had already dismissed the three appeals filed by the respondent. In the circumstances, there was no longer any 'pending' proceeding before the Court of Appeal enabling it to exercise its jurisdiction to grant a stay of proceedings under s 44(1) of the CJA.

[17] Similarly, for the respondent to avail himself of s 80(1) of the CJA, there must also be a 'proceeding pending' before the Federal Court. When the respondent's appeals were dismissed by the Court of Appeal, there was no pending proceeding before the Federal Court at that stage. There was only an undertaking by the respondent that they would be filing an appeal. As such s 79 was not relevant. For those reasons ss 44(1) and 80(1) of the CJA do not empower the Court of Appeal to grant a stay of proceedings in light of the factual matrix of the present appeals. Since the respondent's reliance on ss 44(1) and 80(1) fails as alluded to above it follows that s 79 of the CJA is similarly of no assistance to him. Going from the above, the Court of Appeal had no jurisdiction to entertain the respondent's application for a stay of proceedings upon the dismissal of the three appeals. The grant of the stay was therefore made without jurisdiction and thus a nullity. It is therefore incumbent on this court to revise such order for being a nullity. The enabling provisions are s 86 of the CJA read together with s 87 of the same which confer upon this court a general supervisory and revisionary power identical to the High Court's to correct mistakes committed by courts subordinate to it in respect of any criminal matter (see: *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* [2014] 4 MLJ 495; [2014] 5 CLJ 805 (FC) (at para [17]). On this ground alone this court is seised with the necessary jurisdiction to exercise its revisionary power to rectify the grave error committed by the Court of Appeal.

[18] More crucially and independently of the above, we shall now address the applicable test in the grant of stay in criminal proceedings. In his application before the Court of Appeal, the respondent relied on the decision of this Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257. In *Kosma Palm Oil*, this court held that the test applicable to the grant of a 'stay of execution' is whether there are special circumstances, the most common of which is whether the appeal would be

A rendered nugatory if a stay of execution is not granted (see paras [7]–[10]).

[19] *Kosma Palm Oil* represents the legal position governing stays of execution for civil appeals (see: Tan, Kee Heng, *Civil and Criminal Appeals in Malaysia* (3rd Ed, Sweet & Maxwell, 2016) at Chapter 7.3). The relevant B question before us now is whether it applies with equal force to a stay of criminal proceedings at the trial court when there are pending appeals in respect of interlocutory applications before this court.

C **[20]** On this point, we note that there is only one reported decision from the Court of Appeal affirming the proposition that *Kosma* is applicable. In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 5 MLJ 535, Abdul Malik Ishak JCA expressly endorsed the dual tests of 'special circumstances' and 'nugatoriness' propounded in *Kosma* (at para [81]) as being equally relevant in D an application to stay a criminal proceeding. His Lordship further held that the background scenario, seriousness of the offence which the accused is currently facing, and the conduct of the defence in the trial (ie the delaying tactics employed by the defence) are all relevant factors to be considered by the court in deciding whether a stay of proceedings in a criminal trial should be granted E (at paras [88]–[90]).

[21] The position in Australia is that generally jurisdiction of the courts to stay civil or criminal proceedings pending appeal is an exercise of the inherent jurisdiction of the courts (*Jennings Construction Ltd v Burgundy Royale* F *Investments Pty Ltd (No 1)* (1986) 161 CLR 68 at p 684; *Fuller & Cummings v Director of Public Prosecutions (Cth)* (1994) 68 ALJR 611). Being an extraordinary jurisdiction, exceptional circumstances must be shown before its exercise is warranted. Keeping matters in status quo until the litigation is finally resolved is not the purpose for which the inherent jurisdiction is invoked. G Something quite exceptional must be shown before that jurisdiction is exercised (*Edelsten v Ward (No 2)* (1988) 63 ALJR 346).

[22] The courts apply a more stringent test in considering stay of criminal proceedings. It will not normally be granted pending an interlocutory appeal in H any criminal trial. It is only in very exceptional or unusual circumstances that a stay order is granted (*McNamara v The Queen* (1978) 20 ALR 98; *The Queen v Iorlano* (1983) 151 CLR 678 at p 680; *De Simone v The Queen* [2012] HCATrans 86). In *Beljajev v Director of Public Prosecutions* (1991) 65 ALJR 400, the accused was committed to prison to await his trial on various counts I involving narcotic drugs. He applied for a stay of that order pending appeal. Brennan J held at para [10] that preservation of a status quo alone does not warrant the exercise of the extraordinary jurisdiction to grant a stay. The jurisdiction can be exercised only in extraordinary circumstances, particularly in the case of interlocutory applications in a criminal trial.

[23] The reluctance of the court granting a stay of criminal proceeding is primarily based on policy consideration. It is undesirable that the criminal process be interrupted or fragmented by interlocutory proceedings (*Sankey v Whitlam* (1978) 142 CLR 1 at pp 25–26 and 82–83; *The Queen v Iorlano* (1983) 151 CLR 678 at p 680; *Peter Clyne v The Director of Public Prosecutions for The Commonwealth of Australia and The Attorney-General for The Commonwealth of Australia* (1984) 154 CLR 640 at p 643; *Re Michael Rozenes, Director of Public Prosecutions, And Anor* (1994) 120 ALR 193 at p 194; *Joosse v Australian Securities and Investment Commission* (1998) 73 ALJR 232 at p 234; *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 at para [23]; *R v WR* [2009] ACTSC 93 at para [21]; *The Queen v AI, AD and JR* [2013] ACTCA 16 at para [19]).

[24] In *Seymour v Attorney-General (Cth)* (1984) 4 FCR 498, Jenkinson J explained the underlying policy consideration having regard to the prominence of public interest in the expeditious resolution of accusations of crime. He said this: 'the longer such an accusation remains unresolved the greater the risk of serious harm to the community. Those risks are multifarious: the fading of witness's recollections, the diminution of public confidence in the administration of the criminal law, the prolonging of fears and hatred which the resolution of criminal charges tends to allay, and uncertainty as to the course which the life of the accused is to take, and not infrequently uncertainty as to the courses of other lives, are perhaps the more obvious and the most common. Those considerations of public interest are of great weight ...' ((1984) 4 FCR 498 at p 501).

[25] It has also been reasoned that 'Crown appeals could easily lead to oppression and the defendant's rights are best vindicated by appeal after conviction' (see: *R v Garrett* (1988) 49 SASR 435 at p 451; see further Brennan J in *Beljajev v Director of Public Prosecutions And Another* (1991) 173 CLR 28 at p 32). The caution about the undesirability of fragmentation of criminal process would be more pronounced where a hearing of proceedings has actually commenced (*Khalil v His Honour, Magistrate Johnson & Anor* [2008] NSWSC 1092 at para [117]). Nevertheless, the general position remains that the undesirability of fragmenting the criminal process is not confined to any particular part of the criminal process, but rather to the process as a whole: 'it is not the point that in this case the trial had not commenced or had only just commenced at the time the application for an adjournment to pursue a remedy in this court was made. The principle would make little sense if it applied only to the particular phase of the criminal process which was immediately threatened by being interrupted. Any interference with any part of the process for other than reasons as grave as those acknowledged in the cases referred to is antithetical to the proper and just disposition of criminal cases'

(*Atlas v Director of Public Prosecutions And Others* [2001] VSC 209 at para [26]).

[26] Besides, the Australian courts have taken the view that even if the matters being complained of in the interlocutory appeal do take place and the accused is convicted, 'should the accused reach the stage (after conviction upon full trial) where he wishes to contest on appeal the matters which he now raises, it would then be possible to consider them in a factual setting — a more desirable course than considering them in the abstract' (see: *Re Michael Rozenes, Director of Public Prosecutions, And Anor* (1994) 120 ALR 193 at p 195). This is so even if the issuing of the interlocutory appeal is not opposed by the prosecution or in fact supported by both the prosecution and the defence, for instance to seek a definitive ruling of the appellate or superior court on certain novel issues: 'many questions arise before and in the course of a trial in respect of which a trial judge would be much assisted by a definitive ruling of this Court or the Court of Appeal. However, the proper application of the principles of criminal procedure means that trial judges are required to make rulings on evidence or determine points of procedure as and when they arise either prior to or in the course of criminal trials no matter how novel or difficult the points raised might be. The appeal system exists to ensure that an error made by a trial judge which leads to the possibility of a miscarriage of justice in the result can be corrected in the Court of Appeal' (*Atlas v Director of Public Prosecutions And Others* [2001] VSC 209 at para [23]).

[27] Perhaps most importantly, the Australian courts have taken the stance that the fact that an accused will be put to the expense of a trial is irrelevant in considering whether proceedings should be stayed (*Re Michael Rozenes, Director of Public Prosecutions, And Anor* (1994) 120 ALR 193 at p 195: 'it is undeniable that, if the applicants were ultimately to succeed upon appeal on the grounds which they now raise, they would nevertheless have suffered the expense and strain of a criminal trial. That, however, is a circumstance which is always present when it is sought to contest the ruling of a trial judge and is not of itself, in my view, an exceptional circumstance' (followed in *R v Chardon* [2016] QCA 50 at paras [27]–[28]).

[28] Likewise, the courts in Australia generally show disinclination to allow other forms of collateral challenge in parallel proceedings such as an application for a declaration or other form of judicial review with similar relief in the nature of certiorari, be it commenced in the same court or another civil or criminal court, which has the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial (*Sankey v Whitlam* (1978) 142 CLR 1 at para [14]; *The Queen v Iorlano* (1983) 151 CLR 678 at p 680; *Yates v Wilson* (1989) 18 CLR 338 at p 339; *The Attorney-General v Smith* (1985) 39 SASR

311 at p 313; *Jarrett v Seymour* (1993) 119 ALR 46). In those cases, an important consideration is the need to observe and not fragment the ordinary, and orderly, process of a trial. That consideration would apply with particular force 'where proceedings are in charge of a judge who at this very moment is beginning the trial': *Anderson And Others v Attorney-General for New South Wales And Others* (1987) 10 NSWLR 198 at p 200 (followed in *Hinch v County Court of Victoria* [2009] VSC 548 at para [46]).

[29] In the UK, the power of the court to stay a criminal proceeding is inherent in nature (see: *In re Wickham Marony v Taylor* (1887) 35 Ch D 272 at p 280). Historically, a stay of proceedings 'had the draconian effect of bringing proceedings to a conclusion, unless it was of the conditional variety. This has, however, been superseded by contemporary practice' (see: *R (on the application of AO & AM) v Secretary of State for the Home Department (stay of proceedings – principles)* [2017] UKUT 168 (IAC) at para [20]). A stay of proceedings is different from a stay of execution (*AB (Sudan) v Secretary of State for the Home Department* [2013] EWCA Civ 921 at para [25]). In the case of a stay of proceeding, the governing principles formulated by the Court of Appeal in *AB (Sudan)* (at para [26]), albeit discussed in the immigration and asylum context, are that:

> A stay on proceedings may be associated with the grant of interim relief, but it is essentially different. In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown.
>
> In cases where a request for a stay on proceedings is coupled, expressly or by necessary implication, with a request for interim relief, the court will need to take into account the factors relevant to both types of decision, and may need to take into account a third: that by securing interim relief and a stay, the applicant may be asking the court to use its powers to give him, for as long as he can secure it, a benefit that he may not obtain at the trial.

[30] In short, the principles distilled from the English Court of Appeal decision in *AB (Sudan)* are these:

(a) every claimant is entitled to expect expeditious judicial adjudication. The strength of this expectation will be calibrated according to the individual litigation equation;

(b) the judicially imposed delay flowing from a stay order requires good reason;

(c) judicial choreography whereby one case is frozen awaiting the outcome of another is justified for example where the assessment is that the latter will have a critical impact upon the former;

(d) great caution is to be exercised where a stay application is founded on the contention that the outcome of another case will significantly influence the outcome of the instant case (see: *R (on the application of AO & AM)* at para [23]); and

(e) a stay application will require especially compelling justification in a case qualifying for urgent judicial decision (see: *R (on the application of AO & AM)* at para [24]).

[31] While it is true that the above criteria were discussed in the context of immigration and asylum cases, we do not find any reason to decline adopting and applying the same to criminal proceedings.

DETERMINATIVE PRINCIPLES

[32] In summary, in considering an application for stay of criminal proceedings when commencement of the trial is imminent or continuing in the court of first instance, the determinative principles to be derived from the above cases are as follows:

(a) there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried (*R v Crawley and others* [2014] EWCA Crim 1028 at para [18]);

(b) it is undesirable that the criminal process be interrupted or fragmented by interlocutory proceedings. The considerations of public interest are of great weight leaning in favour of expeditious resolution of accusations of crime;

(c) the undesirability of fragmenting the criminal process is not confined to any particular part of the criminal process, but rather to the process as a whole. Any interference with any part of the process is antithetical to the proper and just disposition of criminal cases. The caution about the undesirability of fragmentation of criminal process would be more pronounced where a hearing of proceedings has actually commenced;

(d) a stay of proceedings application will require especially compelling justification in a case qualifying for urgent judicial decision. For

instance, it is important that anyone charged with serious criminal offences be brought to trial expeditiously. Public interest would not be served by allowing the defence to request for a delay. An accused of serious criminal offences who is not guilty should have the opportunity of clearing his name without excessive delay (*Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68 at para [16]);

(e) a stay of proceedings will not normally be granted pending an interlocutory appeal in a criminal trial. It is only in very exceptional or unusual circumstances that a stay order is granted. This is so even if the issuing of the interlocutory appeal is not opposed by the prosecution or in fact supported by both the prosecution and the defence;

(f) the accused's rights over preliminary or interlocutory rulings made by the trial judge are best vindicated by appeal after conviction, if any. It is generally more desirable to consider preliminary or interlocutory rulings made by the trial judge in appeal after conviction upon full trial with the benefit of a concrete factual setting than considering them in the abstract during interlocutory appeal;

(g) the fact that an accused will be put to the expense of a trial is irrelevant and would not qualify as 'exceptional circumstances' to justify a stay of a criminal trial pending resolution of an appeal; and

(h) the courts should exercise great caution in allowing other forms of collateral challenge, in parallel proceedings such as an application for a declaration or other form of judicial review with similar relief in the nature of certiorari, be it commenced in the same court or another civil or criminal court, which have the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial.

[33] Now, the accused is a public figure who stands charged with offences which cannot by any means be described as trivial, allegedly committed while he was holding office as Prime Minister. Public interest, and indeed his personal interest, dictate that the trials against him should be commenced expeditiously without any unreasonable delay as it is at the denouement of the trial that the court is best-equipped to determine his guilt or otherwise based on factual evidence instead of speculative arguments. Furthermore, he has not established to our satisfaction that his application is so unusual or exceptional that it falls within that class of cases which would justify the grant of a stay. As stated above, a stay of criminal proceedings will only be granted in the rarest of cases and the fact that the proceedings may be rendered a nullity is not a special circumstance. In the context of an application for a stay of proceedings, it is also immaterial that the accused is put to the expense of a trial even if he is subsequently vindicated on appeal.

[34] We have not overlooked the respondent's assertion that the appeal by the appellant was incompetent since there was no appeal record and no petition filed as required by the CJA. This is a non-issue because for criminal proceedings, the record of appeal including the grounds of judgment of the lower court is prepared by the court below (see: r 91 of the Rules of the Federal Court 1995). And without the grounds of judgment, the appellant cannot proceed to file the petition of appeal (see: r 95 of the Rules of the Federal Court 1995). Accordingly, we do not think that the appellant is at fault and in any case the incomplete appeal papers are no impediment to us hearing the appeal proper as we are exercising our revisionary powers. At any rate, the stay order granted by the Court of Appeal cannot be sustained in the face of our elucidation on the correct test to be applied for a stay of criminal proceedings.

[35] For the foregoing reasons we set aside the stay order of the criminal trial granted by the Court of Appeal. Similarly the respondent's oral application for a stay of proceedings before us is dismissed in the absence of any 'exceptional or unusual circumstances'. The matter was therefore remitted forthwith to the High Court to proceed with the criminal trial.

Appeal allowed, the COA's stay order set aside, respondent's oral application for a stay of proceedings dismissed and the case remitted back to the High Court for trial.

Reported by Ashok Kumar